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No. 07-366

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In The

# Supreme Court of the United States

THE ESTATE OF LARRY JEROME JENKINS,

*Petitioner,*

v.

JON BARTLETT,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GRANT F. LANGLEY
City Attorney

SUSAN E. LAPPEN
Assistant City Attorney
*Counsel of Record*
OFFICE OF THE MILWAUKEE CITY ATTORNEY
Room 800, City Hall
200 East Wells Street
Milwaukee, WI 53202
Telephone: (414) 286-2601

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OR CALL COLLECT (402) 342 2831

## COUNTER QUESTION PRESENTED

Pursuant to Sup. Ct. R. 15.2, respondent objects to the question presented by the petition because it is unclear and ambiguous, and it appears to seek consideration of questions not appropriately arising from, or otherwise accurately reflecting, the proceedings or the holdings below. If this court grants the petition, respondent submits that the following is the more accurately phrased question:

1. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN THIS POLICE-INVOLVED FATAL SHOOTING CASE, BY ALLOWING THE EXPERT TESTIMONY OF FORENSIC PATHOLOGISTS INTO EVIDENCE, RELATIVE TO THEIR OPINIONS REGARDING THE DECEDENT'S BODY POSITIONING AT THE TIME HE WAS SHOT?

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, respondent submits that at all times relevant to the subject matter of this litigation, he was employed as a police officer with the City of Milwaukee, which is a governmental entity, and that the City of Milwaukee is responsible for his representation and indemnification. Therefore, no additional disclosure needs to be made.

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## STATEMENT OF THE CASE

Respondent cannot accept petitioner's statement of the case because it omits or otherwise misstates pertinent facts. Sup. Ct. R. 15.2 and Sup Ct. R. 24.2. The following matters should be considered by the court in ruling on the petition.

The Estate attempted to preclude the testimony of Dr. Jentzen and Dr. Mainland, a county medical examiner and an assistant medical examiner, via a pretrial motion which was filed in November, 2003. The plaintiff attempted to preclude the testimony of the two forensic pathologists because of purported inadequacies regarding how the witnesses were identified by the defense, and also because of an ambiguous argument, suggesting that the doctors' anticipated opinion testimony was not consistent with the *Daubert* standards. Respondent Jon Bartlett respectfully refers this court to the response filed by the defendants, on or about November 25, 2003, relative to the Estate's motion to preclude expert testimony. (Record: 52-55). Attached to said response is a copy of the defendants' expert witness designations, and related documents. As supported by those documents, Dr. Jentzen and Dr. Mainland were identified as expert witnesses for the defense, in a letter dated October 1, 2003. The October 1 letter indicated that the doctors would testify consistent with the information contained within the autopsy protocol/report, prepared by Dr. Mainland, along with Dr. Mainland's deposition testimony. (Dr. Mainland had been deposed by opposing counsel prior to the

October 1, 2003 expert witness identification.) Furthermore, counsel for the Estate was put on notice that the doctors' anticipated expert testimony would also be based upon a "reconstruction," relative to the body positioning of the decedent, as it related to bullet paths. The Estate was put on notice that the doctors would opine "that Mr. Jenkins was in a fully upright and seated position, behind the steering wheel, with his right arm raised in an upward and extended position, at the time of the subject shooting incident." Furthermore, attached to the October 1, 2003 expert witness designation was a copy of the Curriculum Vitae for each Dr. Jentzen and Dr. Mainland, which clearly delineated their extensive training and experience in the area of forensic pathology. The trial court denied the Estate's November, 2003 motion to preclude the expert testimony. Furthermore, in an order dated April 6, 2006, the trial court denied the Estate's subsequent attempt to preclude the testimony of Dr. Mainland, via pretrial motions.

During the course of the trial of this matter, the education and training of both Dr. Mainland and Dr. Jentzen were presented to the jury. (Record: 198 at pp. 3-5 and Record: 201 at pp. 3-9). Furthermore, their full Curriculum Vitaes were admitted into evidence. (Trial Exhibits 513 and 514.) Dr. Mainland is now the Medical Examiner for Kenosha County, Wisconsin, and she was called as a witness by the Estate. (Record: 201 at pp. 3, 9). The doctors both participated in the autopsy of Larry Jenkins. (Record:

198 at pp. 6-8; Record: 201 at pp. 72-109). Dr. Mainland was primarily responsible for the autopsy, and she prepared the autopsy protocol and the autopsy notes. (Record: 198 at pp. 6 and 13; See Trial Exhibit 508 for a copy of the Autopsy Protocol). Furthermore, the doctors went to the scene of the subject shooting incident and observed the gunshot damage to the car, along with the interior of the car. (Record: 198 at pp. 7-8 and 26; Record: 201 at pp. 21-23, 39-40, 50).

During the course of Dr. Jentzen's trial testimony, he testified regarding the process by which a body is transported and prepared for autopsy, and also the autopsy process itself. (Record: 198 at pp. 9-11). Dr. Jentzen testified that the autopsy protocol is produced as a result of the autopsy, and that the procedures he described applied to the autopsy of the decedent, Larry Jenkins. (Record: 198 at p. 11). Dr. Mainland testified extensively regarding the observations she made of Mr. Jenkins' body during his autopsy, and how she documented same in the protocol. (Record: 201 at pp. 61-109; Record: 202 at pp. 115-144).

Dr. Jentzen testified that he reviewed the autopsy protocol prepared by Dr. Mainland, and that he agreed with her findings. Dr. Jentzen testified that during the course of an autopsy, the medical examiner makes a determination of bullet paths through the body. (Record: 198 at pp. 14-17). Dr. Jentzen described for the jury how bullet paths are determined, and stated that this determination of bullet

paths is a part of the autopsy process. (Record: 198 at pp. 14-17).

With specific regard to Mr. Jenkins, Dr. Jentzen testified that seven bullets had entered Mr. Jenkins' body. (Record: 198 at p. 17). Both doctors described in great detail the paths of those bullets. (Record: 198 at pp. 17-21; Record: 201 at pp. 61-109; Record: 2002 at pp. 115-144; See also diagrams in Autopsy Protocol, found in Trial Exhibit 508, for further clarification of the location of bullet wounds and pathways). Also, both doctors described for the jury their finding of a "laceration-type abrasion" and bullet fragment found in the right third knuckle area of Mr. Jenkins' hand. (Record: 198 at p. 21; Record: 201 at pp. 140-141, 155). Trial Exhibit 516 illustrates this injury, and the area where the bullet fragment was found. (Record: 198 at pp. 28-29). Dr. Jentzen testified that no bullet wounds or pathways were found below Mr. Jenkins' waist. (Record: 198 at p. 21). Dr. Mainland testified that no bullet wounds or fragments were found on Mr. Jenkins' palms. (Record: 202 at p. 155).

Both doctors testified that it was their opinion that Mr. Jenkins was seated behind the steering wheel of the vehicle, and in the driver's seat, at the time he received his injuries. (Record: 198 at p. 68; Record: 202 at pp. 152-153). Note that counsel for the Estate did not object to this aspect of Dr. Jentzen's testimony. In fact, counsel for plaintiff himself "applauded" Dr. Jentzen on his credentials. (Record: 198 at p. 32).

In addition, both doctors opined that Mr. Jenkins' right arm was in an extended, upward position when he was injured, consistent with holding onto the steering wheel. (Record: 198 at pp. 27-28; Record: 202 at p. 150). Both doctors indicated that in rendering these opinions, they relied on the trajectory of the bullets coming through the vehicle, and the injury patterns noted on Mr. Jenkins' body. (Record: 198 at pp. 70, 86; Record: 202 at pp. 144-147, 162-163). Both doctors observed the bullet damage to the vehicle at the time of the incident in September, 2002, and again at the time they participated in a reconstruction in September, 2003. (Record: 198 at pp. 27-29; Record: 201 at pp. 39-40; Record: 202 at pp. 144-154). Dr. Mainland testified that her opinions were based upon the gunshot wounds and their trajectories, and that they were determined even before the "reconstruction" of September, 2003. (Record: 202 at pp. 144-147).

The "reconstruction" reinforced these opinions. Dr. Mainland testified that she participated in the "reconstruction," which involved placing a person behind the steering wheel of the car, and observing the body in relationship to the bullet pathways through the car, as illustrated by rods placed through the bullet holes, and in relationship to the bullet wound and pathway observations made of Mr. Jenkins' body during the autopsy. (Record: 202 at pp. 144-154).

Dr. Jentzen testified that the photographs which were admitted as Trial Exhibits 503, 504, 505, and

506 illustrated the bullet paths, as demonstrated by the rods placed through the holes in the windshield of the subject vehicle. (Record: 198 at pp. 27-29). Furthermore, the photograph marked as Trial Exhibit No. 509 shows a Medical Examiner's Office Intern, Dr. Frolov, seated behind the wheel of the car, reconstructing the position of Mr. Jenkins' body in relationship to the bullet path rods, and Dr. Jentzen testified that this photo best represents the body positioning of Mr. Jenkins at the time he received his injuries. (Record: 198 at pp. 29-30). Dr. Frolov was 5'8" tall, which is approximately the same height as Mr. Jenkins. (Record: 202 at p. 151; See Exhibit 508, page 5 of the Autopsy Protocol, for Mr. Jenkins' height).

## REASONS FOR DENYING THE WRIT

### I. THE TRIAL COURT'S DECISION TO ADMIT THE TESTIMONY OF THE TWO MEDICAL EXAMINERS INTO EVIDENCE IS SUPPORTED BY THE APPLICABLE LAW.

The Estate has challenged the District Court's ruling to allow Dr. Jeffrey Jentzen, the Milwaukee County Medical Examiner, and Dr. Mary Mainland, the Kenosha County Medical Examiner, to testify regarding their opinions relative to Larry Jenkins' body positioning at the time he was shot by Officer Bartlett, arguing that a technical failure in identifying these two expert witnesses precluded the defense

from eliciting their testimony, pursuant to Fed. R. Civ. P. 26(a)(2)(B). However, the lower courts correctly found that the defense substantially complied with that rule, because their October 1, 2003 expert witness disclosures (1) identified Dr. Jentzen and Dr. Mainland as defense experts; (2) provided the CV's of the doctors, which amply illustrated their qualifications; and (3) clearly identified the opinions of the doctors as being consistent with (a) the autopsy protocol generated from the decedent's autopsy (which plaintiff's counsel already possessed); (b) Dr. Mainland's deposition testimony (which was elicited by plaintiff's counsel prior to October 1, 2003); and (c) a "reconstruction" of the decedent's body positioning at the time he was shot. The only "defect" was that the doctors had not formally signed a report. However, the lower courts correctly held that this "defect" was remedied by subsequent affidavits of the doctors, which adopted the contents of the October 1, 2003 expert witness disclosures. The cases from the various circuits cited by the petitioner do not reject or conflict with the legal standards applied by the lower courts in resolving this issue. Rather, a review of the facts of those cases reveals that none are directly on point, relative to the instant case. The cases cited by the petitioner involve situations where experts were identified after the expert-witness deadline, or where the qualifications of the experts were not provided, or where the scientific methodology employed in reaching the expert opinions was not delineated. Such is not the case now before the court. Also, the cases cited by the plaintiff do underscore the fact-specific

nature of the relevant inquiry. Thus, the lower courts correctly found that Dr. Jentzen and Dr. Mainland were properly disclosed as experts in this case.

Petitioner also challenges the decision of the trial court to admit the testimonies of the two forensic pathologists on the basis of their relevance or materiality. Pursuant to Fed. R. Evid. 104(a), the trial judge must initially determine whether the proffered testimony constitutes scientific knowledge that will assist the trier of fact to understand a material fact. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993).

> The Supreme Court in *Kumho Tire* [*Kumho Tire Co., Ltd. v. Carmichael*, 524 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)] explained that the *Daubert* 'gatekeeper' factors had to be adjusted to fit the facts of the particular case at issue, with the goal of testing the reliability of the expert opinion. For example, engineering testimony rests on scientific foundations, but '[i]n other cases, the relevant reliability concerns may focus upon personal knowledge or experience.' The reason for this needed flexibility is that there are many different kinds of experts and many different kinds of expertise, including experts in drug terminology, handwriting analysis, land valuation, agricultural practices, railroad procedures, and so forth. *United States v. Brumley*, 217 F.3d at 911 (citations omitted).

The various circuit court cases cited by the petitioner are not in conflict with these principles, and none are factually on point.

Both Dr. Mainland and Dr. Jentzen are medical doctors, trained extensively with regard to forensic pathology. Counsel for the Estate "applauded" Dr. Jentzen's credentials, and even called Dr. Mainland as a witness for the Estate. As indicated by the autopsy protocol (See Trial Exhibit 508), both doctors were present for the autopsy of Larry Jenkins, during which bullet wounds, imbedded bullet fragments and bullet pathways found in or on his body were observed and documented. As described by both doctors, the wounds found in Larry Jenkins' right arm illustrated that Mr. Jenkins' arm was in an extended, elevated position, consistent with holding the steering wheel, when he was shot. This opinion was further confirmed by the bullet damage to the car, which established bullet trajectories that were consistent with the trajectories of the bullet wounds and pathways present in Mr. Jenkins' body.

The doctors' opinions were based upon their personal observations of the car and Mr. Jenkins, coupled with their knowledge of forensic pathology. Their opinions did not involve any scientific "testing" or research, or any challenged scientific theories. The subject testimony was reliable and material. Lay people do not, generally speaking, have knowledge in the area of forensic pathology. The opinions provided by the doctors related directly to the subject matter of the case, including the issue of whether or not Officer

Bartlett fired his weapon at Mr. Jenkins, because the officer perceived that Mr. Jenkins was driving the car and attempting to run him down. Thus, the District Court did not err by permitting the experts to render their opinions relative to Mr. Jenkins' body positioning at the time he was shot, and the Seventh Circuit Court of Appeals appropriately upheld this discretionary evidentiary ruling.

## II. THE DECISIONS OF NEITHER THE SEVENTH CIRCUIT COURT OF APPEALS NOR THE TRIAL COURT CONFLICT WITH DECISIONS OF THIS COURT.

As shown above, the question presented in the petition involves a relatively garden-variety application of law to fact, in the context of a discretionary evidentiary ruling. The basis for the trial court's decision to admit the subject testimony is supported by well-accepted precedent. Thus, the decisions of the lower courts do not conflict with decisions of this court.

## CONCLUSION

In conclusion, the petitioner provides no basis for overturning the decisions of the lower courts. Therefore, respondent respectfully asserts that the petition should be denied.

Respectfully submitted on the 18th day of October, 2007.

GRANT F. LANGLEY
City Attorney
State Bar No. 01013700

SUSAN E. LAPPEN
Assistant City Attorney
State Bar No. 01003567

*Attorneys for Respondent*
*Jon Bartlett*

*Post Office Address:*
Room 800, City Hall
200 East Wells Street
Milwaukee, WI 53202
Telephone: (414) 286-2601
Fax: (414) 286-8550
E-Mail: slappe@milwaukee.gov